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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-0736-17

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
12/12/2017
DEANA WILLIAMSON, CLERK

JOHN KENNETH LEE,
Appellant,
v.

THE STATE OF TEXAS,
Appellee.

On Appeal from Cause Number 2-103764
In the County Court at Law #2 of Victoria County and
Cause Number 13-15-00514-CR
In the Court of Appeals for the Thirteenth Judicial District of Texas.

BRIEF FOR THE STATE

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ORAL ARGUMENT NOT REQUESTED

Identity of Judge, Parties, and Counsel

Pursuant to Tex. R. App. P. 68.4(a) (2014), the Judge, parties, and counsel in this suit are:

TRIAL JUDGE:	**The Honorable Daniel Gilliam** **County Court at Law #2** **Victoria, Texas**
APPELLANT:	**John Kenneth Lee**
APPELLEE:	**The State of Texas**
TRIAL DEFENSE ATTORNEY:	**Patti Lea Hutson** **State Bar # 24032704** **110 E. Constitution St.** **Victoria, TX 77901-8137**
TRIAL PROSECUTOR:	**Jesse Thomas Landes** **State Bar # 24094040** **Dallas County Public Defender's Office** **133 N. Riverfront Blvd.,** **Suite C-1, LB-2** **Dallas, TX 75207** **James Pink Dickens** **State Bar # 05818800** **Assistant Criminal District Attorney** **205 N. Bridge St., Suite 301** **Victoria, TX 77901-6576**
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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JOHN KENNETH LEE,.....Appellant

v.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its Criminal District Attorney for Victoria County, and respectfully presents to this Court its brief on the merits in the named cause.

STATEMENT OF THE CASE

Appellant was charged by information on June 16, 2014, in Cause Number 2-103764 with one count of driving while intoxicated. [CR-I-6]. On October 19, 2015, Appellant's case was called for trial. [RR-II-1]. During the trial on the State's eighth and final witness, Appellant's trial counsel requested a mistrial based on the State's opening statement. [RR-III-170-171, 176, 179]. The trial court denied Appellant's request. [RR-III-

188]. After the State had rested Appellant again asked for a mistrial based on the State's opening statement. [RR-III-208]. The trial court again denied the request. [RR-III-208]. The jury found Appellant guilty and sentenced him to 180 days in the county jail and a $1,800 fine. [CR-I-32, 37]. On June 15, 2017, the Thirteenth Court of Appeals (hereafter Court of Appeals) reversed the conviction and held that the trial court erred by not granting Appellant's request for a mistrial. *Lee v. State,* No. 13-15-00514-CR, 2017 WL 2608304 (Tex. App.-Corpus Christi 2017, pet. granted)(mem. op. not designated for publication). On July 12, 2017 the State submitted a petition for discretionary review to this court. On November 15, 2017 this court granted the State's petition.

ISSUES PRESENTED

I. Did the Court of Appeals improperly allow Appellant to raise an issue on appeal that Appellant forfeited at trial by failing to make the required, timely objection?

II. Did the Court of Appeals err by holding it was error for a prosecutor to mention evidence in his opening statement that ultimately proved to be inadmissible?

III. Did the Court of Appeals err in finding that an instruction to disregard would not have cured any potential error from the State's opening statement?

STATEMENT OF THE FACTS

On June 16, 2014, Appellant was charged by information with the offense of driving while intoxicated. [CR-I-6]. Appellant's case was called for trial on October 19, 2015. [RR-II-1].

Prior to the start of voir dire, prosecutor Pink Dickens informed the Appellant that the blood sample in the case had been destroyed and that he had just found out at noon. [RR-II-4]. Appellant's attorney, Ms. Patti Hutson, indicated she understood and did not request a continuance. [RR-II-4-5]. Appellant did not urge either orally or in writing any sort of motion in limine. [RR-II-5; CR]. Appellant elected to have punishment assessed by the jury. [CR-I-27; RR-II-6-7].

During the State's opening argument, prosecutor Jesse Landes argued that the State anticipated it would introduce evidence showing Appellant had a blood alcohol level of .169. [RR-III-10]. Appellant did not object to this statement. [RR-III-10]. Instead, Ms. Hutson argued in her opening statement that she did not believe the State would be able to produce any blood evidence. [RR-III-14].

The State then called Mr. Carlos Vasquez, Jr. to testify. [RR-III-16]. Mr. Vasquez described how on October 11, 2013, he was stopped at a red light when his vehicle was struck from behind by another vehicle [RR-III-

18]. His truck was totaled, and he was injured in this incident, receiving a concussion that required him to receive medical treatment at a hospital. [RR-III-21-22]. Mr. Vasquez also indicated he has had lingering back problems since this incident. [RR-III-21-22].

The State then called Mr. Javier Sanchez to testify. [RR-III-25]. Mr. Sanchez testified to witnessing the car accident. [RR-III-26-27]. Mr. Sanchez identified Appellant as the person who caused the car accident and confirmed [RR-III-29-30] and noted Appellant "kind of smelled like alcohol." [RR-III-28].

The State then called Mr. Juan Sanchez to testify. [RR-III-38]. Juan Sanchez also testified to observing the accident. [RR-III-38-39]. Juan Sanchez further established that Appellant was intoxicated and had a "pretty strong" odor of alcohol. [RR-III-41].

The State next called Sergeant Jason Sager of the Victoria Police Department. [RR-III-47]. Sergeant Sager responded to the accident and identified Appellant as the driver at fault. [RR-III-48-49, 51]. Sergeant Sager also testified that Appellant had glassy and bloodshot eyes, an odor of alcohol on his breath, and slurred speech. [RR-III-51-52]. Sergeant Sager also indicated Appellant told him Appellant had only consumed non-alcoholic beverages that night. [RR-III-52].

Sergeant Sager than explained he administered the horizontal gaze nystagmus (HGN) test to Appellant because if Appellant had only been drinking non-alcoholic beverages he would not show any nystagmus. [RR-III-53]. Sergeant Sager also confirmed Appellant did not claim to have any pre-existing brain injury or neurological damage. [RR-III-56]. Sergeant Sager then explained that four out of six clues indicated intoxication on the HGN and that Appellant showed all six clues on the HGN test. [RR-III-58].

Because Mr. Vasquez had been injured in the car accident, the police decided to pursue a mandatory blood draw at the hospital. [RR-III-59]. After consulting with the Victoria County Criminal District Attorney it was also decided to pursue a search warrant for a blood draw. [RR-III-59].

The State next called Officer J. J. Houlton of the Victoria Police Department. [RR-III-75]. Officer Houlton also responded to the accident and interacted with Appellant at the crash scene. [RR-III-76-77]. Officer Houlton smelled alcohol coming from Appellant's breath and person [RR-III-79] and located an open bottle of the alcoholic beverage Crown Royal that was "a little over half full" in Appellant's vehicle. [RR-III-79-80]. Appellant had bloodshot eyes, and Officer Houlton determined from questioning that Appellant did not have any head trauma. [RR-III-87].

Officer Houlton administered the HGN test to Appellant who again showed all six clues. [RR-III-89]. Appellant was "very aggressive" towards him due to him being a "rookie cop." [RR-III-92]. Appellant also failed the Walk and Turn field sobriety test. [RR-III-92, 94-96]. Appellant then refused to attempt the One Legged Stand field sobriety test, claiming he had a leg injury. [RR-III-96]. Appellant again claimed to have only consumed non-alcoholic beverages that night. [RR-III-97].

Appellant was offered the opportunity to voluntarily provide both a breath and blood sample but declined to provide a sample. [RR-III-101-02; State's Exhibit 1].

Officer Houlton transported Appellant to Citizens Medical Center for a blood draw. Appellant was "very upset" about being taken to the hospital, requiring Officer Houlton to call for assistance. [RR-III-107]. Officer Houlton observed the two blood draws done at the hospital and took the blood samples from the hospital to the Victoria Police Department. [RR-III-107-11].

The State next called Beatrice Salazar, the phlebotomist who took Appellant's blood samples in this case. [RR-III-142, 145]. Appellant objected to Ms. Salazar's testimony, arguing that without the blood vials this witness would have nothing about which to testify. [RR-III-143-44].

Appellant also insisted the State would not be able to prove any chain of custody for the blood evidence. [RR-III-144]. The trial court permitted the State to proceed with its questioning. [RR-III-144].

Ms. Salazar then testified to the procedures she utilizes to draw blood. [RR-III-146-50]. She always uses alcohol-free swabs "on all alcohol draws" [RR-III-147], the vials she used for taking Appellant's blood contained anti-coagulant powder. [RR-III-148-49], and the blood was taken in a sanitary location. [RR-III-150].

The State next called Sergeant Kelly Luther of the Victoria Police Department. [RR-III-160]. Sergeant Luther explained the procedures for sending blood samples to a forensic laboratory for testing [RR-III-161-162]. and confirmed the blood samples for Appellant had been accidentally destroyed. [RR-III-163].

The State next called Gene Hanson, section supervisor at the Texas Department of Public Safety in Weslaco with the intention of introducing the blood alcohol results. [RR-III-167]. Appellant objected and a hearing was held outside the presence of the jury concerning this testimony. [RR-III-168-69].

Once the jury was out of the room, Appellant objected to Mr. Hanson's testimony on the basis that the State could not prove up chain of

custody and that Mr. Hanson was a forensic scientist rather than a chemist. [RR-III-170]. Appellant then requested a mistrial based on the State's opening argument. [RR-III-170-71]. Appellant also asserted that the defense had not had an opportunity to inspect the blood themselves. [RR-III-171]. Appellant did not request an instruction for the jury to disregard the portion of the State's opening argument concerning the blood test results. [RR-III-170-71]. Ms. Hutson also conceded that she knew the State did not have the blood test evidence prior to the State's opening argument. [RR-III-171].

The State responded to this argument by explaining why it believed it would be able to get the blood test results admitted even without the actual blood samples. [RR-III-172-73].

Appellant than reiterated that the destruction of the evidence had denied him the opportunity "to verify the chain of custody" [RR-III-175, 178-179] and twice more requested a mistrial. [RR-III-176, 179].

The trial court subsequently asked the State how it intended to prove that the blood that was tested at the forensic laboratory came from Appellant. [RR-III-180]. The prosecutor answered in response to this inquiry that Officer Houlton testified to the Victoria Police Department case number and that case number would match the number on the Department of

Public Safety laboratory results and that there would also be other identifiers on the laboratory report that would match up with Appellant. [RR-III-180].

Appellant then proceeded with the voir dire examination of Mr. Hanson. [RR-III-182]. During that examination, Appellant asked Mr. Hanson how he would be able, without the actual blood vials, to establish that the blood he tested came from Appellant. [RR-III-186]. Mr. Hanson answered this question by explaining that part of his case notes includes documenting that he verified that the name on the submission form matches the name on the blood tube, and that the laboratory case number is the same case number that is on the blood tube kit box. [RR-III-187]. Mr. Hanson would have noted any such discrepancies if the name or number had not matched. [RR-III-187].

After hearing Mr. Hanson's testimony, the trial court ruled it would allow the State to continue with trying to prove the chain of custody in the case. [RR-III-188]. The trial court also issued a motion in limine against the State asking any question concerning the actual blood results without first getting clearance from the court. [RR-III-188-189].

At no time during the voir dire hearing for Mr. Hanson did Appellant ever request an instruction to disregard the State's opening argument. [RR-III-169-189].

Upon trial resuming before the jury, Mr. Hanson testified to receiving a blood vial with Appellant's name on it. [RR-III-191]. This vial was sealed and there was no evidence that it had been subject to any tampering. [RR-III-191]. The vial had multiple identifiers upon it including Appellant's name and a unique identification number. [RR-III-193], and Mr. Hanson knew this blood sample was from Appellant as he he verified the specimen label on the blood tube with that of the submission form and both matched. [RR-III-194]. The blood tube kit itself also contained identifiers as it had the laboratory identification number as well as the initials of the submitting police agency and the dates [RR-III-194], and the submission form had the laboratory number and Appellant's name. [RR-III-194].

The State subsequently approached the trial court and informed the trial court of its intent to enter the laboratory report into evidence. [RR-III-200]. The trial court then convened another hearing outside the presence of the jury. [RR-III-200-201].

Appellant then renewed his objections on the grounds he had not been permitted to inspect the blood evidence and to the lack of adequate chain of custody in this case. [RR-III-201-02]. Ms. Hutson also argued she did not know if the blood that had been tested came from the first or second blood draw. [RR-III-202-03]. Appellant did not make any objection based on the

propriety/constitutionality of the mandatory blood draw statute. [RR-III-201-03].

After hearing all of the arguments, the trial court sustained Appellant's objection and ruled the blood test results would be inadmissible. [RR-III-205]. Appellant did not renew his request for a mistrial at this point. [RR-III-205]. Appellant also did not ask for an instruction to disregard the portion of the State's opening argument concerning the blood tests results. [RR-III-205].

The State rested, and Appellant rested without presenting any evidence. [RR-III-207].

After both sides had closed a charge conference was held, and Appellant again asked for a mistrial due to the State's opening argument. [RR-III-208]. The trial court denied that request. [RR-III-208]. Appellant again did not request any sort of instruction to disregard any portion of the State's opening statement. [RR-III-208].

The charge of the court defined intoxication only as the loss of normal use of physical or mental faculties; it did not contain any definition related to alcohol concentration. [CR-I-28; RR-III-210-11]. The charge further instructed the jury that the evidence in this case was the testimony presented and the exhibits admitted in open court, [CR-I-29; RR-III-212] that the

argument and statements of the attorneys are not evidence and cannot be considered in the jury's determination of the disputed facts in the case. [CR-I-29; RR-III-212], and that they could only find Appellant guilty of the charged offense if they found it proven by the evidence beyond a reasonable doubt. [CR-I-29; RR-III-212].

In Appellant's closing argument, Ms. Hutson reminded the jury that the State had failed to submit any blood test evidence to the jury. [RR-III-222]. Ms. Hutson also stressed that she was the one who had told the jury the truth rather than the State. [RR-III-222]. Ms. Hutson then reminded the jury of the trial court's instruction that the statements of counsel were not evidence. [RR-III-222].

The State's closing argument made no references to the blood test results. [RR-III-215-220, 224-226].

The jury found Appellant guilty of the charged offense. [CR-I-32]. The jury subsequently sentenced him to 180 days in the county jail and a $1,800 fine. [CR-I-37].

On October 23, 2015, Appellant filed a motion for new trial. [CR-I-3, 51-60]. Amongst other grounds, he alleged that the trial court had committed reversible error by not granting his motion for a mistrial [CR-I-51] and added an allegation of prosecutorial misconduct due to the

prosecutors mentioning the blood test results in the State's opening argument despite knowing they were inadmissible. [CR-I-52].

On October 28, 2015, the State filed an answer that included sworn affidavits from the two prosecutors on the case, Mr. Jesse Landes and Mr. James Pink Dickens, explaining why they believed the blood test evidence would be admissible. [CR-I-79-80; 82-83]. Mr. Landes avered that he believed in good faith that he would be able to establish the chain of custody for the blood evidence in this case to be admissible through the testimony of Officer Houlton and Mr. Hanson and it was only after Mr. Hanson testified that Mr. Landes became aware that Mr. Hanson was not able to adequately establish the chain of custody to the blood that had been lawfully taken from Appellant. [CR-I-79-80].

The trial court did not rule on Appellant's motion for new trial, allowing it to be overruled as a matter of law. [CR-I; SCR-I].

SUMMARY OF THE ARGUMENT

Texas law requires an objection to be made at the first opportunity. Appellant knew at the time of the State's opening statement that the blood test samples had been destroyed. Thus if it was error for the State to mention in its opening statement the blood test results due to the blood samples having been destroyed then Appellant should have objected as soon

as the State mentioned the blood test results in its opening statement. Appellant did not do so and thus forfeited any claim of error. Accordingly, it was error for the Court of Appeals to allow Appellant to even raise this issue on appeal.

Texas law holds that so long as a prosecutor acts in good faith when they make their opening statement there is no error even if the prosecutor makes reference to facts in that opening statement that are not subsequently presented to the jury. The trial prosecutor had a good faith belief at the time he made his opening statement that he could establish the necessary chain of custody through the witnesses he called to make the blood test results admissible, and the Court of Appeals had no basis to conclude otherwise. Therefore there was nothing improper in the trial prosecutor mentioning the blood test results in his opening statement, and the Court of Appeals ruling should be reversed.

The Court of Appeals also erred in concluding that an instruction to disregard would have been ineffective in this case. Appellant sought only a mistrial and never requested any sort of lesser curative instruction such as an instruction to disregard. Failure to seek an instruction to disregard waives any claim of error related to denial of a mistrial if the instruction to disregard would have been effective. A timely instruction to disregard would have

cured any error from an improper opening argument by the State. Therefore the Court of Appeals committed error.

ARGUMENT

I. Request to address issues raised in petition for discretionary review out of order.

Although the Court of Appeals allowing Appellant to litigate an issue on appeal that Appellant had failure to preserve at trial with the required timely objection was the second issue raised in the State's petition for discretionary review, the State believes its brief will flow more logically if this issue is addressed first. As such the State requests permission to address the second issue of its petition first, then return to the first issue, and conclude with the third issue.

II. The Court of Appeals committed reversible error by allowing Appellant to appeal an issue for which Appellant failed to make a timely objection at trial.

A. Appellant forfeited any claim of error related to the State's opening argument by failing to make a timely objection.

To preserve error for appellate review, the complaining party must make a timely, specific objection. See Tex. R. App. P. 33.1(a); *Dixon v. State,* 2 S.W.3d 263, 265 (Tex. Crim. App. 1998). The requirement of timeliness means the objection must be made at the earliest possible

opportunity. *Marini v. State,* 593 S.W.2d 709, 714 (Tex. Crim. App. 1980) As such an objection must be made as soon as the grounds of objection become apparent. *Hollins v. State,* 805 S.W. 2d 475, 476 (Tex. Crim. App. 1991). Furthermore, the requirement for a timely, specific objection applies with full force to alleged errors in the State's opening statement. See *Euziere v. State,* 648 S.W.2d 700, 703 (Tex. Crim. App. 1983)("the general rule is that any impropriety in the prosecutor's argument to the jury is waived by a defendant's failure to make a proper, clear, and timely objection); see also *Aguirre v. State,* 683 S.W.2d 502, 508 (Tex. App.-San Antonio 1985, pet. ref'd); *Blount v. State,* No. 14-00-01057, 2002 WL 27289 at 5 (Tex. App.-Houston [14th Dist.] 2002, no pet.)(mem. op. not designated for publication); *Duran v. State,* No. 08-01-00512-CR, 2003 WL 195072 at 3 (Tex. App.-El Paso 2003, no pet.)(not designated for publication.)

Now it is true that a party does not forfeit a claim based on an objection to an opening statement if the opening statement was not objectionable at the time it was made and only became objectionable later in the trial. See *Peake v. State,* 792 S.W.2d 456, 459 (Tex. Crim. App. 1990). However, in this case Appellant's entire basis for seeking a mistrial was under the theory that because the blood test samples had been destroyed, he could not determine if the blood tested by Mr. Hanson was actually the

Appellant's blood, and as such the blood test results were intrinsically inadmissible. [RR-III-175, 178-79, 201-202]. Furthermore, the trial record unequivocally establishes that Appellant knew, a full day before the State made the alleged improper comment, that the blood test samples had been destroyed. [RR-II-4-5; III-10].

If the blood test results were intrinsically inadmissible due to the accidental destruction of the blood samples, and Appellant already knew prior to the start of trial that the blood samples had been destroyed, then the objectionable nature of the State referring to the blood test results in its opening statement would have been apparent as soon as the State mentioned the blood test results. [RR-III-10]. Thus under Appellant's own theory for why the State's opening statement was improper, Appellant was required to object to the State's opening statement at the time that statement was made. Appellant failed to do so [RR-III-10] and that failure to object in that moment forfeited any claim of error related to the State's opening argument (which obviously includes forfeiting any claim of error related to the trial court denying his motion for mistrial since Appellant's only justification for a mistrial was based on the State's allegedly improper opening statement.)

B. The Court of Appeals erred in ruling for Appellant on a forfeited claim of error.

The Court of Appeals' opinion asserts that the State should not have mentioned the blood test results in its opening statement "without physical evidence." *Lee,* 2017 WL 2608304 at 5. The Court of Appeals' opinion also states that it was "misconduct" for the State to mention the BAC results in its opening statement "knowing that this evidence was destroyed." *Id.* at 6. Thus it is clear the Court of Appeals agreed with Appellant's contention that it was the destruction of the blood samples themselves that made it intrinsically impossible for the State to present evidence of the blood test results. Unfortunately, the Court of Appeals' opinion entirely fails to explain, how if the blood test results were intrinsically inadmissible due to the destruction of the physical evidence and if the record plainly shows that Appellant was aware of the destruction of the physical evidence prior to the start of trial [RR-II-4-5], that Appellant preserved this claim of error when he failed to make a timely objection at trial. [RR-III-10].

The closest the Court of Appeals comes in attempting to square this circle is when it acknowledges that Appellant failed to object at the time of the State's opening statement but then asserts that Appellant "objected multiple times throughout the remainder of the trial." *Lee,* 2017 WL

2608304 at 6. That may be true, but it is immaterial to the question of whether Appellant waived his claim of error related to the State's opening argument. To preserve error you must object as soon as the grounds of objection become apparent. *Hollins,* 805 S.W. 2d at 476. Appellant did not do so and thus forfeited any claim of error on this point.

The requirements for a timely objection exist for a good reason. They ensure that both the trial court and the opposing party have the opportunity to cure any possible defect as soon as it occurs and before such a defect can do irreparable damage to the trial process. See *Garza v. State,* 126 S.W.3d 79, 82 (Tex. Crim. App. 2004). And indeed the Court of Appeals' own opinion helps demonstrate why timely objections are of such importance. The Court of Appeals opinion specifically cites the State's attempt through multiple witnesses to get the blood test results admitted as a factor that increased the harm to Appellant. See *Lee,* 2017 WL 2608304 at 6. But if Appellant had made a timely, specific objection at the beginning of the trial, when the Court of Appeals claims inadmissibility was obvious, then it is entirely possible that those witnesses would never have been called (or at least that they would not have testified before the jury). Thus the Court of Appeals' own opinion shows why it is essential to require timely, specific objections at the first opportunity.

Accordingly, since the Court of Appeals allowed Appellant to appeal on a grounds that Appellant orfeited at trial by failing to make the required timely objection, the Court of Appeals must be reversed.

III. The Court of Appeals committed reversible error by concluding the State's opening statement was improper.

A. An opening statement is not error just because it mentions facts that ultimately are not admitted into evidence.

Even if it is determined that Appellant did not forfeit his claim of error related to the State's opening statement by his failure to timely object, the Court of Appeals still erred in reversing Appellant's conviction because the State's opening statement was made in good faith and thus was not improper.

Article 36.01 of the Texas Code of Criminal Procedure instructs prosecutors to "state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof." As such the State's opening statement is an outline of facts which the prosecution in good faith expects to prove. See *Serrano v. State,* No. 03-15-00654-CR, 2017 WL 4228717 at 4 (Tex. App.-Austin 2017, no pet.)(mem. op. not designated for publication); *Fisher v. State,* 220 S.W.3d 599, 603 (Tex. App.-Texarkana 2007, no pet.); *Ketchum v. State,* 199 S.W.3d 581, 597

(Tex. App.-Corpus Christi 2006, pet. ref'd.) Furthermore, it is not error for a prosecutor to tell the jury in opening statement what they expect to prove, even if the prosecutor does not later offer such proof at trial. See *Matamoros v. State,* 901 S.W.2d 470, 475 (Tex. Crim. App. 1995); *Marini,* 593 S.W.2d at 715.

There is no meaningful distinction between evidence the State was unable to admit at trial and evidence the State did not even try to admit at trial. Both scenarios involve effectively the same situation: the State mentioning something in its opening statement that for whatever reason does not ultimately end up as evidence before the jury. Therefore both scenarios should be treated the same and that means that as long as the prosecutor acted in good faith, there is no error in the prosecutor mentioning a fact in their opening statement that for whatever reason never ends up in evidence before the jury.

Unfortunately, the Court of Appeals disregarded this Court's established precedents on this principle and instead held that it was reversible error for the trial court not to grant a mistrial after the State mentioned the Appellant's blood test results in its opening argument since that evidence ultimately proved inadmissible. See *Lee,* 2017 WL 2608304 at 5. By doing so the Court of Appeals made the determinative factor in

evaluating the propriety of an opening statement not whether the prosecutor was acting in good faith at the time they made their opening statement but instead whether the evidence mentioned in the opening statement became admissible or not.

This new approach created by the Court of Appeals represents a radical departure from existing precedent concerning what is permissible argument in opening statements. Far from the generous standard this Honorable Court authorized in *Marini* and reaffirmed in *Matamoras* (a standard that is necessary to enable the State to comply with the mandate of Article 36.01 of the Texas Code of Criminal Procedure), the Court of Appeals' approach means that the State makes an opening argument at its own risk, with the threat of a mistrial hanging over the State's head should the State be unable to prove anything that it mentioned in its opening statement. Such a highly restrictive and punitive approach will, if allowed to stand, inevitably have a chilling effect on the ability of prosecutors to provide proper opening statements because prosecutors will be forced to choose between giving extremely guarded opening statements where they only reference the evidence they are absolutely certain will be admitted (and thus end up producing rather banal opening statements that do little to explain the contested facts of the case to the jury) or risk mistrial if they try

to fully comply with Article 36.01 by mentioning evidence that might not ultimately be admitted. Either way the prosecutor's ability to present their case is unfairly impeded, an intolerable result that in inconsistent both with the statutory mandate of Article 36.01 and with this Court's established precedent and thus should not be allowed to stand.

B. The trial prosecutor made his opening statement in good faith.

If the Court of Appeals had applied the proper standard of review for evaluating opening statements then it would have been forced to conclude there was nothing improper in the State's opening argument because there is no evidence that the trial prosecutor, Mr. Landes, was not acting in good faith when he made his opening statement.

Mr. Landes made a sincere effort to get the blood test results admitted in this case. The chain of custody for scientifically analyzed evidence is sufficient if it is establish up to the point the evidence reaches the laboratory. See *Medellin v. State,* 617 S.W. 2d 229, 232 (Tex. Crim. App. 1981). Mr. Landes called as witnesses both Ms. Salazar, the phlebotomist who took Appellant's blood samples [RR-III-142, 145], and Mr. Hanson, the forensic scientist who received the blood samples at the laboratory. [RR-III-191]. Thus he called the witnesses who could establish

the chain of custody on Appellant's blood samples from the time it was taken until the time it reached the laboratory. Those are the actions of an attorney who is making a good faith effort to get blood test evidence admitted.

Nor is the idea that blood test results could be admissible even after the blood sample itself was destroyed a ridiculous idea. Texas law has long held that the failure to preserve breath test ampoules goes to the weight and credibility of the breath test evidence rather than its admissibility. See *Turpin v. State,* 606 S.W. 2d 907, 917-918 (Tex. Crim. App. 1980). If breath test results can be admissible even after the breath test ampoules have been destroyed, it is at least plausible that the same consideration would apply for blood test vials.

Furthermore, it is clear that Mr. Landes believed at the time he made his opening statement that the forensic scientist, Mr. Hanson, would be able to adequately establish that the blood he tested was the same blood that had been lawfully taken from Appellant. [CR-I-79]. Now as it turns out Mr. Landes was incorrect on this point as once Mr. Hanson got on the stand he proved unable to adequately establish that the blood he tested was the blood that had been lawfully taken from Appellant. [CR-I-80]. But just because Mr. Landes was ultimately wrong does not mean he was acting in bad faith.

Bad faith requires more than simply being wrong. Indeed bad faith requires more than even being negligent. See *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988)(holding that negligence is insufficient to prove bad faith). Bad faith requires evidence showing some improper motive such as personal animus against a defendant. See *Ex parte Napper,* 322 S.W. 3d 202, 238 (Tex. Crim. App. 2010). And while the *Youngblood* and *Napper* cases concern bad faith in regards to the destruction of evidence rather than in regards to opening statements, there is no logical reason why the same standard should not apply when evaluating bad faith as to opening statements. Thus bad faith requires more than a prosecutor simply making a mistake. It requires active malice. There is no evidence Mr. Landes had any sort of malice or other bad motive against the Appellant, and thus there is no reason to conclude his opening statement was not made in good faith.

Now the Court of Appeals never outright accused Mr. Landes of not acting in good faith, but it did assert that the State committed "misconduct" when it mentioned the blood test results while knowing that the blood samples had been destroyed. *Lee,* 2017 WL 2608304 at 6. That argument necessarily requires the Court of Appeals to have concluded that the destruction of the blood samples made the blood test results intrinsically inadmissible and as discussed in Part II of this Answer, if that is the case

then Appellant cannot receive any relief because if the blood test results could not possibly have been admitted then Appellant forfeited any claim of error by not objecting as soon as the State mentioned the blood test results. *Hollins,* 805 S.W. 2d at 476.

Given that Appellant did not object at the time of the State's opening statement [RR-III-10], the only way Appellant can even be heard on an appeal challenging the State's opening statement is if the State's opening statement was not objectionable at the time it was made but instead only became objectionable due to subsequent events in the trial. See *Peake,* 792 S.W.2d at 459. Thus for Appellant's appeal to even be heard that requires rejection of the idea asserted by the Appellant and accepted by the Court of Appeals that the blood test results were intrinsically inadmissible due to the destruction of the blood samples. However, that in turn means it must have been at least theoretically possible for the State to establish the chain of custody for the blood test samples despite their destruction through the testimony of live witnesses which fatally undermines any claim that Mr. Landes was not acting in good faith at the time he made his opening statement.

If the blood test results could at least theoretically have been admissible despite the destruction of the blood test samples then the only

possible way to establish that Mr. Landes was not acting in good faith at the time he made his opening statement would be to be show that Mr. Landes knew prior to making his opening statement that Mr. Hanson would not be able to establish the necessary chain of custody (i.e. that Mr. Landes lied in the affidavit he submitted where he averred that he believed Mr. Hanson would be able to establish the necessary chain of custody. [CR-I-69.]) That is a question of fact not of law because it turns entirely on the question of what did Mr. Landes know and when did he know it, and since it is a question of fact rather than law it is question that is properly decided by the factfinder (i.e. the trial court) not the Court of Appeals. Furthermore, the trial court did implicitly decide that question in favor of a determination that Mr. Landes was acting in good faith at the time he made his opening statement when the trial court denied (by operation of law) Appellant's motion for a new trial.

Appellant put the issue of whether Mr. Landes was acting in good faith at the time he made his opening statement before the trial court when Appellant filed a motion for new trial and asserted as one of the grounds in said motion that the State had committed "prosecutorial misconduct" by alluding to blood test results in the State's opening statement when "the State could not reasonably believe that the results would be supported by

admissible evidence." [CR-I-52]. Thus Appellant's motion for new trial essentially accused Mr. Landes of acting in bad faith.

Mr. Landes refuted the allegation in an affidavit he submitted as part of the State's Answer to Appellant' Motion for a New Trial where he averred why he sincerely (if mistakenly) believed at the time of his opening statement that he would be able to get the blood test results admitted. [CR-I-78-80]. Mr. Landes specifically averred that prior to making his opening statement he believed the forensic scientist, Mr. Hanson, would be able to establish the necessary chain of custody to show that the blood he tested was the blood that was lawfully taken from Appellant. [CR-I-79].

The trial court did not submit a written ruling on Appellant's motion for new trial. [CR-I]. Therefore in accordance with Texas Rule of Appellate Procedure 21.8(c), Appellant's motion was denied as a matter of law.

A trial court is the finder of fact at a motion for new trial. See *Okonkwo v. State,* 398 S.W. 3d 689, 694 (Tex. Crim. App. 2013). Therefore the trial court is the sole judge of witness credibility at a hearing on a motion for new trial with respect to both live testimony and affidavits. *Id.* Furthermore, when a trial court does not make explicating findings of fact, an appellate court should impute factual findings that support the trial

court's ruling so long as such findings are reasonable and supported in the record. *Johnson v. State,* 169 S.W.3d 223, 239 (Tex. Crim. App. 2005).

Now the trial court did not directly rule on Appellant's motion and instead allowed that motion to be denied as a matter of law, but there is no logical reason to treat a motion that has been denied by operation of law any different than a motion that is directly denied. In both situations the trial court has come to the conclusion that a defendant's claims do not warrant a new trial. Thus even if the denial of a defendant's motion for new trial is done by operation of law rather than by express ruling, the appellate courts should still impute all findings to the trial court that can be supported by the record which will support the trial court's (de facto) ruling.

In this case the trial court denied (by operation of law) Appellant's motion for new trial. As such the Court of Appeals should have imputed whatever factual findings could be supported by the record that would support the trial court's ruling which means the Court of Appeals should have imputed that the trial court found Mr. Landes' affidavit credible and accepted that he sincerely believed at the time he made his opening statement that he would be able to establish the necessary chain of custody through the testimony of Mr. Hanson. [CR-I-79].

Appellate courts must likewise afford almost total deference to a trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor and also must view the evidence in the light most favorable to the trial court's ruling and defer to the trial court's implied findings. *Okonkwo,* 398 S.W. 3d at 694. Thus not only should the Court of Appeals have concluded that the trial court found Mr. Landes' affidavit credible, but the Court of Appeals should also have deferred to that credibility determination. And with the trial court making an implicit credibility determination that Mr. Landes was truthful in his affidavit there was no basis for the Court of Appeals to find that Mr. Landes did not act in good faith at the time he made his opening statement.

Furthermore, even if this Honorable Court elects not to require appellate courts to impute implied findings to the denial of a motion for new trial when said motion is denied by operation of law rather than explicit ruling, that still leaves insufficient basis to support a conclusion that Mr. Landes was not acting in good faith at the time he made his opening statement. There is absolutely no evidence in the record showing that Mr. Landes had any sort of animus against Appellant or any other bad motive. [RR; CR]. Thus there is nothing in the record that would support a

conclusion that Mr. Landes did not act in good faith in making his opening statement.

Therefore since Mr. Landes acted in good faith when he made his opening statement his opening statement was not improper, and as such the Court of Appeals erred in reversing Appellant's conviction.

IV. The Court of Appeals committed reversible error by holding that an instruction to disregard would have been insufficient to cure any error from the State's opening argument.

Furthermore, even if the Court of Appeals was correct in holding that the State's opening statement constituted some kind of error and in finding that Appellant did not waive this issue by failing to object at the time of the State's opening statement, the Court of Appeals still erred when it concluded that a motion to disregard would have been insufficient to cure any alleged error from the State's opening statement.

Appellant only sought a mistrial as a remedy over the alleged error from the State's opening statement and never requested an instruction to disregard. [RR-III-170-171, 176, 179, 208]. This is of critical importance because under Texas law a trial court's ruling denying a mistrial will not be disturbed on appeal if the movant did not request a lesser remedy that would have been adequate to cure the alleged error. *Young v. State,* 137 S.W. 3d

65, 70 (Tex. Crim. App. 2004). Thus Appellant could only be entitled to relief if an instruction to disregard would have been ineffective in this case.

The Court of Appeals concluded an instruction to disregard would have been ineffective. *Lee,* 2017 WL 2608304 at 6. This holding was error as an instruction to disregard would have cured any error from the State referencing the blood test results in its opening statement.

It is presumed a jury will obey a trial court's instructions. See *Thrift v. State,* 176 S.W. 3d 221, 224 (Tex. Crim. App. 2005). Moreover, timely instructions to disregard have been deemed effective to cure most forms of error. Prompt instructions to disregard will ordinarily cure error associated with improper evidence being brought before the jury. See *Ovalle v. State,* 13 S.W. 3d 774, 783 (Tex. Crim. App. 2000). Likewise in most cases an instruction to disregard will cure any error from an improper closing argument. See *Wesbrook v. State,* 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). If an instruction to disregard is generally sufficient to cure error from improper evidence being brought before the jury and from improper closing arguments then such an instruction would certainly be adequate to cure any error from an improper opening statement in all but the most extreme of circumstances. Nor did such extreme circumstances exist in this case and

thus there was no justification for the Court of Appeals to conclude an instruction to disregard would have been ineffective if requested.

The alleged error in this case was a single isolated statement by the prosecutor at the start of trial. [RR-III-10]. The State never again mentioned the alcohol concentration level or made any argument that Appellant had an alcohol concentration above the legal limit. [RR-III]. Such a single, isolated event can certainly be cured by an instruction to disregard. See *Wesbrook,* 29 S.W.3d at 115-116(holding that a single improper reference in closing argument by a prosecutor did not warrant reversal when the trial court issued an instruction to disregard.) The State also freely acknowledged that the blood evidence was destroyed by agents of the State [RR-III-163], thus making it clear to the jury that it was the State's fault there was no blood evidence before them in the case. The trial court subsequently gave the jury a jury charge that instructed them to only decide the case based on the evidence and that the arguments of the attorney's were not evidence [CR-I-29; RR-III-212], thus making it clear the jury was not to utilize the prosecution's opening statement as evidence in the case. Finally, the definition of intoxication in the jury charge did not mention alcohol concentration or authorize conviction based on Appellant's alcohol

concentration [CR-I-28-29], making it legally impossible for the jury to convict the Appellant based on an alcohol concentration level.

Accordingly, to believe an instruction to disregard would have been ineffective in this case, it is necessary to conclude that the jury would have ignored the trial court's instructions and convicted Appellant under a theory of intoxication that was not even presented to them based on a single statement that the prosecutor made in his opening statement that was completely uncorroborated by any actual evidence during the trial itself and despite the fact that the jury knew it was agents of the State that were responsible for the absence of blood evidence. That is far too implausible a sequence of events to warrant reversal.

Appellant was not charged with the type of inflammatory, emotionally charged offense where it might be plausible that a jury would go rogue and disregard the trial court's instructions. Appellant was not charged with a sex crime or a crime against children, the type of cases that are inherently inflammatory. See *Montgomery v. State,* 810 S.W.2d 372, 397 (Tex. Crim. App. 1990)(holding that sexually related misconduct and misconduct involving children is inherently inflammatory.) Appellant was instead charged with misdemeanor driving while intoxicated. [CR-I-6].

Such a case is very unlikely to be the type where a jury would become so emotionally engaged that they would disobey the trial court's instructions.

Furthermore, instructions to disregard have been deemed adequate to cure error under far more inflammatory circumstances than those at issue in the present case. See *Adams v. State,* 156 S.W.3d 152, 157-158 (Tex. App.-Beaumont 2005, no pet)(holding a reference to a Portable Breath Test having a result above .08 was cured by an instruction to disregard); *Hollier v. State,* 14-99-01348-CR, 2001 WL 951014 at 5 (Tex. App.-Houston [14th Dist] 2001, no pet)(mem. op. not designated for publication)(holding that an instruction to disregard cured the improper testimony correlating HGN test results with blood-alcohol levels); *Berry v. State,* 13-01-241-CR, 2002 WL 406978 at 2 (Tex. App.-Corpus Christi 2002, no pet.)(not designated for publication)(holding that an instruction to disregard was sufficient to cure any error from the improper admission of a defendant's prior convictions); *Johnson v. State,* 83 S.W.3d 229, 232 (Tex. App.-Waco 2002, pet. ref'd)(holding that an instruction to disregard was sufficient to cure error from the prosecutor commenting on a defendant's post-arrest silence); *Decker v. State,* 894 S.W.2d 475, 477 (Tex. App.-Austin 1995, pet. ref'd)(holding that an instruction to disregard was sufficient to cure any error from the prosecutor's voir dire implying the defendant might have molested

other children.) If an instruction to disregard can cure something as extremely inflammatory as a prosecutor implying that a defendant might be a serial child sex offender, an instruction to disregard is certainly sufficient to cure a statement about blood test results. Thus there is no reason to believe an instruction to disregard would have been ineffective in this case if it had been requested.

The Court of Appeals devotes very little time explaining why an instruction to disregard would have been inadequate in this case. The primary argument it makes is to insist that Appellant would have had to request multiple instructions to disregard and that having to repeatedly request instructions to disregard would have eroded their effectiveness. *Lee,* 2017 WL 2608304 at 6. The Court of Appeals cites no legal authority for the proposition that an instruction to disregard is rendered ineffective because a party might have to subsequently ask for additional instructions to disregard, and the State is aware of no such legal authority.

Now there is case law that repeated curative effects and cautionary instructions will be deemed ineffective if they are repeatedly ignored by the prosecution. See *York v. State,* No. PD-1753-06, 2008 WL 2677368 at 5 (Tex. Crim. App. 2008)(not designated for publication). But even the Court of Appeals does not argue that the State would have disregarded an

instruction to disregard, and there is nothing in the record that suggests the prosecution would have disobeyed an instruction to disregard in this case. Quite the contrary in fact: after the trial court issued a mid-trial motion in limine, instructing the trial court to approach the court before asking any questions about the blood test results [RR-III-188-189], Mr. Landes fully complied with that instruction. [RR-III-200]. Thus far from there being reason to believe Mr. Landes would have attempted to circumvent any instruction to disregard issued by the trial court, the evidence shows Mr. Landes would have complied with any instruction issued by the trial court. Therefore there is no reason to believe an instruction to disregard would have been ineffective.

Furthermore, even if the Court of Appeals is correct that multiple instructions to disregard will dilute the effect of said instruction, that is immaterial because Appellant would not have needed multiple instructions to disregard. Appellant would in fact only ever have had to request a single instruction to disregard.

If we assume (as the Court of Appeals seemingly did) that the blood test results could never be admitted since the original blood samples were destroyed, then Appellant would only have to request a single instruction to disregard as soon as the State first mentioned the blood test results. [RR-III-

10]. The State would have had no reason to even try and call Ms. Salazar or Mr. Hanson if the trial court had ruled at the beginning of the trial that the blood test evidence was per se inadmissible due to the blood samples being destroyed, and thus there would have been no need for any subsequent instructions to disregard.

Likewise, if we assume (as the State has argued) that the blood test results could potentially be admitted despite the blood samples having been destroyed so long as Mr. Hanson could adequately establish the end of the chain of custody for the lawfully collected blood sample, then there would be no need for an instruction to disregard until the point at which the trial court determined Mr. Hanson was unable to establish the required chain of custody and thus that the blood test results were not admissible. [RR-III-205]. It would only be at that point when an instruction to disregard would be appropriate (since up to that point the prior testimony concerning the blood samples would have been conditionally relevant). And since the State made no further attempts to admit the blood test results after the trial court ruled the blood test results inadmissible [RR-III-205-209] that single instruction to disregard would have been the only instruction to disregard the trial court would have to have issued.

As such, under either legal theory the trial court would only ever have to have issued a single instruction to disregard and there would have been no danger of the instruction to disregard losing its power from having to be repeatedly issued.

Nor is it plausible that the State's efforts during the trial to lay the foundation for the blood test evidence unduly heightened the prejudicial effect of the State's opening argument and thus made it impossible for an instruction to disregard to be effective. The subsequent blood evidence testimony consisted of the phlebotomist, Ms. Salazar, testifying to how blood samples are collected [RR-III-146-150] and the forensic scientist, Mr. Hanson, describing how blood samples are analyzed. [RR-III-195-196]. Such dry, technical testimony is hardly the kind of graphic, exciting testimony that will stir the hearts of jurors and compel them to ignore their oaths to obey the instructions of the trial court. Nor at any point during the testimony of either Ms. Salazar or Mr. Hanson did either witness actually state what the results of the blood test analysis were. [RR-III-143-159, 167-168, 190-200, 205-206]. And while it is possible that the testimony of Ms. Salazar and Mr. Hanson might have reminded the jurors that the State had promised blood test results evidence in its opening argument, such a reminder would be damaging to the State's case rather than helpful as it

would inevitably remind the jury that the State had promised evidence that it failed to provide, while also reminding the jury that the defense counsel was correct when she told them in her opening argument that the State would not actually produce any blood evidence in this case. [RR-III-13-14].

Furthermore the attempts by the State to prove up the blood test results were hardly the "crux" of the trial. Ms. Hanson and Mr. Salazar's combined testimony before the jury was limited in subject and brief in nature. [RR-III-143-159, 167-168, 190-200]. It was of minimal importance when compared to the overwhelming evidence the State spent substantially more time developing which showed the Appellant was guilty under a loss of normal use theory of intoxication.

Appellant drove into a vehicle that was sitting at a red light. [RR-III-18, 26-27, 38-39]. He was at fault for the accident. [RR-III-29-30]. Appellant denied drinking alcohol [RR-III-52, 97], but two civilian and two law enforcement witnesses confirmed Appellant smelled of alcohol. [RR-III-28, 41, 52, 79]. False statements related to a criminal offense are relevant evidence as consciousness of guilt evidence. See *King v. State,* 29 S.W. 3d 556, 565 (Tex. Crim. App. 2000).

Appellant displayed multiple indications of intoxication including bloodshot eyes [RR-III-51, 87], slurred speech [RR-III-51], a swayed stance

[RR-III-92, 106], inability to walk a straight line [RR-III-106], and aggressive behavior. [RR-III-92, 107]. He had a half-filled open container in his vehicle within easy reach. [RR-III-80]. He twice failed the HGN field sobriety test [RR-III-58, 89], failed the Walk and Turn field sobriety test, [RR-III-92, 94-96] and refused to perform the One Legged Stand field sobriety test [RR-III-96] or provide a breath or blood sample. Refusal to perform a field sobriety test or provide a breath or blood test can be evidence of intoxication. See *Barraza v. State,* 733 S.W. 2d 379, 381 (Tex. App.-Corpus Christi, *aff'd,* 790 S.W. 2d *654* (Tex. Crim. App. 1990).

Thus far from the evidence of Appellant's blood test results being the "crux" of the trial, the State spent almost no time before the jury trying to prove up the blood test results and instead devoted the vast majority of its efforts to showing Appellant was intoxicated due to the loss of normal use of his physical and/or mental faculties. As such there was no reason for a jury to be improperly influenced by the brief and ultimately inconsequential testimony of Ms. Salazar and Mr. Hanson, and no reason for the Court of Appeals to conclude an instruction to disregard would have been ineffective in this case. *Lee,* 2017 WL 2608304 at 6. Therefore, the Court of Appeals erred in holding an instruction to disregard would be ineffective, and as such their ruling reversing Appellant's conviction should be reversed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court reverse the judgment of the Court of Appeals and the trial court and remand this case to be heard on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Victoria County, Texas, certify that the number of words in Appellee's Brief submitted on December 12, 2017, excluding those matters listed in Rule 9.4(i)(3) is 8,724.

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CERTIFICATE OF SERVICE

I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Victoria County, Texas, certify that a copy of the foregoing brief was sent by electronic mail to Arnold Hayden, Attorney for the Appellant, John Kenneth Lee, and by United States mail to Ms. Stacy M. Soule, P. O. Box 13046, Capitol Station, Austin, Texas 78711, State Prosecuting Attorney, on this the 12th day of December, 2017.

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